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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

LURA HESS BECHTEL et al.,

Plaintiffs and Appellants,

v.

SANDEL AVIONICS, INC.,

Defendant and Respondent.

D063128

(Super. Ct. No. 37-2010-00104069-  
CU-PO-CTL)

LURA HESS BECHTEL et al.,

Plaintiffs and Respondents,

v.

SANDEL AVIONICS, INC.,

Defendant and Appellant.

D063930

CONSOLIDATED APPEALS from a judgment and order of the Superior Court of San Diego County, Steven R. Denton, Judge. (Retired judge of the San Diego Sup. Ct.) Affirmed in part, reversed in part and remanded with directions.

Boudreau Williams, Williams Iagmin and Jon R. Williams for Plaintiffs and Appellants and for Plaintiffs and Respondents.

Law Offices of Steven K. Brunk, Steven K. Brunk; Higgs Fletcher & Mack, John M. Morris and Victoria E. Fuller for Defendant and Respondent and for Defendant and Appellant.

This wrongful death and survival action arose out of an airplane crash that killed Donald Hess and his wife, Victoria Hess. Their two children, Lura Hess Bechtel and Johanna V. Hess (together, Plaintiffs), sued Sandel Avionics, Inc. (Sandel), the manufacturer of a flight instrument on the airplane, asserting causes of action for negligence, strict liability, and breach of warranty. Plaintiffs appeal, contending the trial court erred by (1) permitting Sandel to inquire about the size of Plaintiffs' inheritance, (2) reducing the jury's damages award based on principles of comparative fault and set off, and (3) determining Plaintiffs were not the prevailing parties for purposes of awarding costs. Sandel cross-appeals, arguing the trial court erred by failing to award it costs because it was the prevailing party under Code of Civil Procedure section 1032, subdivision (a)(4). (Undesignated statutory references are to the Code of Civil Procedure.) We reject Plaintiffs' arguments on appeal. We further conclude Sandel was the prevailing party in this action and, as such, was entitled to recover its costs. Accordingly, we remand to the trial court for a determination and award of Sandel's recoverable costs.

## FACTUAL AND PROCEDURAL BACKGROUND

In 2008, Donald and Virginia flew to Tallahassee, Florida in an airplane piloted by Donald. The airplane was equipped with a Sandel horizontal situation indicator. Plaintiffs contended that on the day of the accident, the airplane's flux detector became loose and caused incorrect information to be transmitted to the Sandel instrument. Donald then received incorrect heading information from the Sandel instrument. Plaintiffs claimed that the Sandel instrument was improperly designed because it provided a flux detector failure warning in cases of electrical interruption, but not for mechanical problems such as what occurred in this case. Thus, Plaintiffs contended the airplane crashed due to the Sandel instrument's failure to display the correct heading and to provide Donald with warnings. Sandel, on the other hand, claimed the crash was the result of pilot error and Donald's inexperience with the particular airplane he was flying.

Plaintiffs sued Sandel for negligence, strict liability, and breach of warranty. The jury found the Sandel instrument was defectively designed and supplied without adequate warnings, Sandel was negligent, and Sandel breached a warranty owed to Donald and Victoria that the Sandel instrument was airworthy, in compliance with federal regulations, or that it was capable of detecting and warning of a flux detector failure. The jury found each of these items was a substantial factor in causing the airplane crash. The jury, however, also found that Donald was negligent. It apportioned 65 percent of the responsibility for the crash to Sandel and 35 percent to Donald.

The parties stipulated that New York law applied to the issue of damages. The jury awarded wrongful death damages in the amount of \$520,000 to each of the

Plaintiffs to compensate them for loss of support, guidance, tutelage, services, assistance, and deprivation of intellectual, moral and physical education Donald and Victoria would have given. The jury also awarded Plaintiffs \$160,000 on their survival claims for the value of certain stock options and awarded Donald and Victoria \$500,000 each for pain and suffering between the time they realized they were going to crash and when they sustained physical injury. Although the jury awarded a total of \$2.2 million in damages, it did not award Plaintiffs any damages on their claim for the loss of inheritance they would have received if Donald and Victoria had lived.

After the trial was completed but before entry of judgment, Plaintiffs settled related claims they had with third parties (the New York Settlements). The parties stipulated that the total amount of the New York Settlements was greater than the verdict entered against Sandel in this case. Sandel asserted that the jury's \$2.2 million verdict should be reduced based on Donald's 35 percent comparative fault and set off for the New York Settlements. Plaintiffs, on the other hand, argued their damage award should not be reduced because the jury found in their favor on the breach of warranty claim, a contract-based cause of action not subject to set off and comparative fault reductions.

The trial court recognized that the jury found for Plaintiffs on multiple theories which supported the damages award. The strict products liability and negligence claims allowed for application of comparative fault while breach of warranty did not. Accordingly, in determining whether to apply comparative fault, the trial court stated it must "look to the gravamen of Plaintiffs' claims against [Sandel] in order to determine if this case sounds primarily in contract or in tort." The trial court determined the case was

primarily a products liability and negligence action and thus reduced the damages award by 35 percent due to Donald's comparative fault.

On the issue of set off for the New York Settlements, the trial court concluded New York law was intended to prevent double recovery and applied in "any situation in which two or more persons can be held liable for causing the same injury," including contractual claims. Thus, based on the parties' stipulation that the New York Settlements exceeded the jury's damages award in this case, the trial court applied a set off and reduced the judgment to zero.

## DISCUSSION

### *I. Inheritance Evidence*

#### A. Additional Background

Prior to trial, Plaintiffs moved in limine to preclude any evidence or argument that Donald and Victoria were wealthy. The trial court deferred ruling on the matter in order to further consider the issue. In the meantime, however, the court stated it trusted counsel would not discuss the issue in opening arguments.

During trial, Plaintiffs' expert economist, William Partin, testified regarding Plaintiffs' economic damages. As part of his economic loss calculations, Partin included the value of Donald's "investment management services" to manage Donald's and Victoria's investments in various venture capital companies and their stock portfolios. Partin determined the value of those services was \$26,586 per year for 11 years (until Donald was 75 years old). Partin testified \$26,586 was one quarter of an average financial adviser's annual salary.

During cross-examination, Sandel's counsel asked a series of questions regarding the basis of the investment management fee. Partin stated the financial adviser's fee related to Donald's time managing his venture capital funds and other investments. When Sandel's counsel inquired as to how much Donald's and Victoria's retirement assets were worth, Plaintiffs' counsel objected based on relevance. The trial court ruled that Sandel was "entitled to inquire as to the basis of the opinion given for loss of investment services." Sandel's counsel then asked Partin to state the amount of Donald's and Victoria's investment portfolio, which the financial adviser would be managing. Partin stated the total was \$5.6 million.

Sandel's counsel questioned Partin about whether \$25,000 per year was a reasonable fee for managing \$5.6 million. Partin responded that a financial adviser would charge at least one percent of the gross estate value to manage it and thus the actual replacement value for Donald's services was much higher than \$25,000. Sandel's counsel then confirmed that Partin estimated approximately \$25,000 to manage \$5.6 million. Later, Sandel's counsel asked whether Plaintiffs had actually hired an investment adviser to manage the \$5.6 million investment portfolio they received from Donald and Victoria. Partin confirmed Plaintiffs had hired an investment adviser.

Sandel's counsel again mentioned the size of Donald's and Victoria's estate when questioning Partin concerning tax issues. For example, Sandel's counsel inquired as to the rate Partin used to calculate income taxes on Donald's and Victoria's "\$5.6 million investment portfolio." Subsequently, when discussing estate taxes, Partin testified that there likely would have been no estate taxes on Donald's and Victoria's estate because he

believed estate taxes for those other than "extremely wealthy individuals" would decrease over time. Sandel's counsel followed up by asking, "So you think that people that have \$5.6 million in a retirement fund are not extremely wealthy; is that what you're saying?" Partin responded that the government did not consider them extremely wealthy.

The issue of the amount of Plaintiffs' inheritance arose again in anticipation of testimony from Sandel's expert economist, Patrick Kennedy. Plaintiffs objected to the use of a demonstrative exhibit, which reflected Donald's and Victoria's wealth and the amount of Plaintiffs' inheritance. The trial court ruled that it would permit Kennedy to testify on the basis of his demonstrative exhibit.

Later, Plaintiffs argued that evidence of the size of Donald's and Victoria's estate and their wealth should not be admitted because it was prejudicial and not relevant. Thus, outside the presence of the jury, the court asked Kennedy whether that evidence was necessary for him to express his opinions as to Plaintiffs' wrongful death and loss of inheritance damages. Kennedy conceded that he could opine whether there would have been an increase in the size of Plaintiffs' inheritance without disclosing the amount of Plaintiffs' inheritance. Thus, the trial court fashioned a solution where Plaintiffs waived foundational testimony as to Kennedy's calculations and Kennedy could testify about those calculations without disclosing the size of the estate.

## B. Analysis

Plaintiffs argue the trial court's admission of evidence concerning their financial condition prejudicially impacted the jury's consideration of their loss of inheritance

claim. Specifically, Plaintiffs claim that the jury's knowledge that Plaintiffs inherited \$5.6 million resulted in the jury's failure to award any damages on the loss of inheritance claim because the jury "undoubtedly concluded that [Plaintiffs] had 'inherited enough' and were worthy of nothing more." We reject this argument.

Only relevant evidence is admissible at trial. (Evid. Code, § 350.) Relevant evidence is evidence that has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) However, even when evidence is relevant, the trial court "may exclude [that] evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.)

"The law vests wide discretion in the trial court to decide the relevance of proffered evidence. [Citation.] The trial court is also vested with broad discretion in ruling on the admissibility of evidence. [Citation.] The weighing process under Evidence Code section 352 depends on the trial court's consideration of the unique facts and issues of each case, rather than on mechanically automatic rules; the court's ruling will be upset only if there is a clear showing of an abuse of discretion." (*Smith v. Brown-Forman Distillers Corp.* (1987) 196 Cal.App.3d 503, 519-520; accord, *Tudor Ranches, Inc. v. State Comp. Ins. Fund* (1998) 65 Cal.App.4th 1422, 1431.)

"It is . . . the general rule that in a wrongful death action[,] evidence of the heirs' wealth or poverty is inadmissible." (*Webb v. Van Noort* (1966) 239 Cal.App.2d 472, 479; and see *McLaughlin v. United Railroads* (1915) 169 Cal. 494, 498 (*McLaughlin*).)



"This rule of evidence has its foundation in the refusal of the court to allow the defendant to benefit by his own wrong, to lessen his responsibility in damages for the injury which he has inflicted, by a showing that, quite fortuitously, through no contribution of defendant's own, the plaintiffs have received a certain pecuniary benefit." (*McLaughlin*, at p. 498.) Moreover, "a deliberate attempt by counsel to appeal to social or economic prejudices of the jury, including the wealth or poverty of the litigants, is misconduct where the asserted wealth or poverty is not relevant to the issues of the case." (*Hoffman v. Brandt* (1966) 65 Cal.2d 549, 552-553.) However, evidence of the assets inherited by plaintiffs is admissible where plaintiffs "opened the combat" by putting the matter at issue. (*Stathos v. Lemich* (1963) 213 Cal.App.2d 52, 57.)

Here, we agree with the general premise that evidence of a decedent's wealth and the amount of an heir's inheritance is not admissible where it is not relevant to the issues of the case. In this case, however, Plaintiffs, perhaps unwisely, made the amount of their inheritance relevant when they claimed as an item of damages more than \$26,000 per year for loss of investment services to manage those funds. Plaintiffs' economic expert stated the management fee was for one quarter of an average financial adviser's annual salary. Based on this evidence, defense counsel was entitled to inquire as to the funds the financial adviser would be managing in order to challenge the reasonableness of the expert's damages calculations. We do not see defense counsel's statements as an attempt to appeal to the economic prejudices of the jury. Instead, defense counsel aptly noted that he was attempting to figure out the basis for the fee because if the financial adviser

was managing a portfolio of \$25,000, a management fee of that same amount may not be reasonable.

Moreover, the trial court instructed the jury that it "must not show any bias against any plaintiffs owing to the value of their parents' estate. All persons are viewed equally in the eyes of the law, regardless of their economic status and the plaintiffs should be viewed equally in [their] deliberations." We presume the jury followed this instruction and find nothing in the record indicating that it departed from the instruction.

Lastly, even assuming the trial court erroneously admitted the evidence, such admission did not result in prejudice. Based on the evidence, we do not agree with Plaintiffs that the admission of the amount of their inheritance necessarily resulted in the jury's failure to award any damages on their loss of inheritance claim. Rather, there was significant evidence from which the jury could have concluded that there was no loss in value of Plaintiffs' inheritance. For example, Kennedy testified that Plaintiffs may have actually inherited more than they would have if their parents had lived longer. This is because Donald and Victoria would have consumed some of the estate to live through their full life expectancy. Further, the jury awarded Plaintiffs \$2.2 million. This substantial award contradicts Plaintiffs' position that the jury failed to award Plaintiffs damages based on their wealth.

Based on the foregoing, we conclude the trial court acted within its discretion in admitting evidence regarding the value of Plaintiffs' inheritance.

## II. *Set Off and Comparative Fault*

Plaintiffs argue the trial court erred by reducing the jury's damages award based on principles of comparative fault and set off. Specifically, Plaintiffs argue that because the jury did not apportion damages between each cause of action, the trial court could not reduce their damages based on comparative fault and set off as those concepts apply only in tort actions and they prevailed on a breach of warranty claim which was contractual in nature.

As we shall explain, the trial court properly set off the jury's damages award based on the New York Settlements, which the parties stipulated were in excess of the jury's verdict in this case and any judgment to be entered on that verdict. As such, the trial court properly reduced Plaintiffs' damages to zero and we need not consider whether principles of comparative fault apply as a discussion on that point is meaningless where there can be no further damages reduction.

The parties stipulated that New York law applies to the issue of damages. In regard to set offs, New York's law provides the following: "When a release . . . is given to one of two or more persons liable or claimed to be liable in *tort* for the same injury, or the same wrongful death, it does not discharge any of the other *tortfeasors* from liability for the injury or wrongful death unless its terms expressly so provide, but it reduces the claim of the releasor against the other *tortfeasors* to the extent of any amount stipulated by the release . . . or in the amount of the consideration paid for it, or in the amount of the released *tortfeasor's* equitable share of the damages . . . whichever is the greatest." (N.Y. Gen. Oblig. Law § 15-108, subd. (a) (*italics added*) (section 15-108).)

In *Board of Education of Hudson City School District v. Sargent, Webster, Crenshaw & Folley* (1987) 71 N.Y.2d 21 (*Board of Education*), a case involving New York's contribution law, the court discussed whether breach of warranty is a tort or contract-based cause of action. (*Id.* at p. 28, fn. 2.) In that regard, the court stated, "while it is true that the [contribution] statute is applicable in cases where a tort-feasor is charged with 'breach of warranty' in connection with a defective product that causes injury, in such cases the breach of warranty is as much a tortious wrong as it is a breach of contract [citations]. Indeed, we have recognized that the appellation 'breach of warranty' in product liability cases is misleading, for 'strict products liability sounds in tort rather than in contract' [citations]." (*Ibid.*) Breach of warranty in the strict liability context "'is not the old sales warranty, it is not the warranty covered by the Uniform Sales Act or the Uniform Commercial Code. It is not a warranty of the seller to the buyer at all, but it is something separate and distinct which sounds in tort exclusively, and not at all in contract; which exists apart from any contract between the parties; and which makes for strict liability in tort.'" (*Victorson v. Bock Laundry Mach. Co.* (1975) 37 N.Y.2d 395, 402; see also *Goldberg v. Kollsman Instrument Corp.* (1963) 12 N.Y.2d 432, 436.) "[I]t is the fact of liability to the same person for the same harm rather than the legal theory upon which *tort liability* is based which controls[.]" (*Board of Education*, at p. 28.)

Here, Plaintiffs contend the trial court should not have used the New York Settlements to set off their damages because they prevailed on a contractual breach of warranty claim and section 15-108 applies only to tort claims. Although section 15-108

is phrased in terms of "tortfeasors," that term does not preclude application to all breach of warranty causes of action as those claims may be based in tort or contract. In this case, the gravamen of Plaintiffs' breach of warranty cause of action sounded in tort. Plaintiffs did not allege that decedents entered into a contractual relationship with Sandel. Instead, they complained that Sandel put a defective product into the stream of commerce and exposed users of that product to great bodily injury or death. Plaintiffs sought to recover from Sandel for injuries sustained as a consequence of Sandel's defective product. Accordingly, the trial court instructed the jury with CACI No. 1230 regarding express warranties in the products liability context. Further, the trial court provided the jury with tort damages instructions rather than any contract-based damages instructions. Where Plaintiffs claim a breach of warranty based on a defective product that causes injury, the breach of warranty is a tortious wrong. (*Board of Education*, 71 N.Y.2d at p. 28, fn. 2.) Accordingly, section 15-108 was applicable to this case and the trial court did not err in setting off Plaintiffs' damages based on the New York Settlements.

### III. *Prevailing Party*

#### A. Additional Background

Both parties sought to recover costs as the prevailing party in this action. Plaintiffs claimed that neither party fell within one of the four express categories of a prevailing party under section 1032, subd. (a)(4). Thus, plaintiffs contended the trial court should exercise its discretion to deem them the prevailing party "because they proved each element of their causes of action, exposed a dangerous defect which

[Sandel] must now rectify to prevent further loss of life, and exonerated their father's good name." Sandel argued it was entitled to recover its costs because section 1032, subdivision (a)(4), expressly defined it to be the prevailing party.

On Plaintiffs' claim for costs, the trial court found that Plaintiffs were not the prevailing party because they did not obtain a net monetary recovery. The court also rejected Plaintiffs' request that the court exercise its discretion to award them costs. On this point, the court noted that while a trial court retains discretion to award any, all or some costs to a prevailing party, the court did not reach that step of the analysis because Plaintiffs were not the prevailing party in this case. On Sandel's request for costs, the trial court found Sandel was not the prevailing party because it did not meet its litigation objective to defeat any finding of liability. Thus, the trial court found that neither party prevailed for the purpose of awarding costs.

#### B. Analysis

Plaintiffs argue the trial court erred in concluding they were not the prevailing party for purposes of awarding costs. Sandel cross-appeals, arguing the trial court erred by failing to award it costs because it was the prevailing party under section 1032, subdivision (a)(4).

"Except as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding." (§ 1032, subd. (b); see *Lincoln v. Schurgin* (1995) 39 Cal.App.4th 100, 104 (*Lincoln*).) A "prevailing party" is defined by statute to include the following: (1) "the party with a net monetary recovery"; (2) "a defendant in whose favor a dismissal is entered"; (3) "*a defendant*

*where neither plaintiff nor defendant obtains any relief*"; and (4) "a defendant as against those plaintiffs who do not recover any relief against that defendant." (§ 1032, subd. (a)(4), italics added.) If a party falls into one of these categories, the court must find the party is a prevailing party and award his or her claimed costs that are recoverable under the applicable statutes. (See *Michell v. Olick* (1996) 49 Cal.App.4th 1194, 1197-1198 (*Michell*).) "When any party recovers other than monetary relief and in situations other than as specified, the 'prevailing party' shall be as determined by the court, and under those circumstances, the court, in its discretion, may allow costs or not and, if allowed may apportion costs between the parties on the same or adverse sides." (§ 1032, subd. (a)(4).) A trial court's determination that a litigant is a "prevailing party," along with its award of fees and costs is reviewed for an abuse of discretion. (See *Villa De Las Palmas Homeowners Assn. v. Terifaj* (2004) 33 Cal.4th 73, 94; *PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095.)

Here, Plaintiffs do not contend they were the prevailing party under one of the four enumerated categories set forth in section 1032, subdivision (a)(4). Instead, Plaintiffs argue the trial court should have exercised its discretionary authority to award them costs because they obtained "other than monetary relief." Plaintiffs claim the trial court did not understand it had discretion under section 1032, subdivision (a)(4), to award costs despite the court's finding that Plaintiffs did not obtain a net monetary recovery.

We do not agree with Plaintiffs that the trial court misunderstood its discretionary authority. The trial court clearly found that Plaintiffs were not the prevailing party

because they did not obtain a net monetary recovery. It then went on to discuss Plaintiffs' request for a discretionary award of costs. The trial court stated that while it always retains discretion to award any, some or all costs to a prevailing party, Plaintiffs have not prevailed in this action. We do not interpret the trial court's statements as a misunderstanding of its authority under 1032, subdivision (a)(4).

Moreover, under the circumstances of this case, we do not agree with Plaintiffs that they were the prevailing party for purposes of costs. Based on the record, it is clear that Plaintiffs' litigation objective was to obtain a monetary recovery. They did not meet this goal. Even though Plaintiffs prevailed on their causes of action and were awarded damages by the jury, they did not ultimately obtain monetary relief. (See *Goodman v. Lozano* (2010) 47 Cal.4th 1327, 1334-1335 [holding that where a plaintiff's prior settlement exceeds the award received at trial, plaintiff's net monetary recovery is zero and does not compel the trial court to designate such party as a prevailing party].) Further, although Plaintiffs may have "exposed a dangerous defect which [Sandel] must now rectify to prevent further loss of life, and exonerated their father's good name," this was not their primary litigation objective and does not make them the prevailing party in this action. Accordingly, the trial court acted well within its discretion in denying Plaintiffs' request for costs.

Sandel claims that it should have been deemed the prevailing party because section 1032, subdivision (a)(4), expressly defines a "prevailing party" to include "a defendant where neither plaintiff nor defendant obtains any relief." We agree with Sandel.



A defendant who falls within one of section 1032, subdivision (a)(4)'s statutory prevailing party categories is entitled to costs as a matter of right. (*Michell, supra*, 49 Cal.App.4th at pp. 1197-1198 ["[a]s rewritten, section 1032 now declares that costs are available as 'a matter of right' when the prevailing party is within one of the four categories designated by statute"]; see *Lincoln, supra*, 39 Cal.App.4th at p. 105; see also *Childers v. Edwards* (1996) 48 Cal.App.4th 1544, 1549-1551; *Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 128-129.) These courts have recognized that a trial court has the discretion to determine the prevailing party only "[i]n other situations or when a party recovers other than monetary relief . . . ." (*Michell*, at p. 1198, italics omitted; see *Lincoln*, at p. 105 ["[b]ecause this case does not fit into any of the four . . . categories [of section 1032, subdivision (a)], . . . the trial court may determine the prevailing party and in its discretion may choose to allow or not to allow costs"].)

Based on our examination of the statute and well-settled authority, we conclude a court has no discretion to deny costs to a party who falls squarely within one of the categories of a prevailing party under section 1032, subdivision (a)(4). Here, Sandel clearly met the statutory definition of a prevailing party as it was a "defendant where neither plaintiff nor defendant obtain[ed] any relief." (§ 1032, subd. (a)(4).) The court thus erred in finding that Sandel was not a prevailing party. On remand, the court has broad discretion in determining whether the costs claimed by Sandel are recoverable under applicable statutes. (See *Heller v. Pillsbury Madison & Sutro* (1996) 50

Cal.App.4th 1367, 1395; *Ladas v. California State Auto. Assn.* (1993) 19 Cal.App.4th 761, 774.)

#### DISPOSITION

The trial court's March 15, 2013, order finding Sandel was not the prevailing party is reversed and the matter is remanded to the trial court to determine the amount of recoverable costs to which Sandel is entitled. In all other respects, the judgment is affirmed. Sandel is awarded costs on appeal.

MCINTYRE, J.

WE CONCUR:

HUFFMAN, Acting P. J.

HALLER, J.